

No. 12422

IN THE  
United States  
Court of Appeals  
FOR THE NINTH CIRCUIT

LOMAX TRANSPORTATION COMPANY,  
a corporation, *Appellant*, No. 12422  
*vs.* UNITED STATES OF AMERICA, *Appellee.*

## PETITION TO REMAND

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The appellee respectfully prays that this cause be remanded to the District Court for the reception of further evidence as to the amount of damages. The appellee respectfully prays that this Court grant a rehearing as to the propriety of remanding this case to the District Court for the reception of evidence in accordance with the Court's opinion filed July 14, 1950.

## I. Facts Justifying a Remand.

There are only two parts to this law suit. The first question was whether or not there was a contract between the Lomax Transportation Company and the United States. This court decided that phase of the case in favor of the appellee and decided that there was a contract of insurance but that the trial court erroneously considered the "Certificate of Settlement" of the General Accounting Office as making a *prima facie* case for the appellee on the question of the amount of damages.

In the interest of fairness and justice the appellee should be permitted to submit competent evidence if it can do so in accordance with the opinion. This could result in no substantial hardship to the appellant and would enable the trial court to consider the amount of damages. It should be pointed out that there was no jury trial in the case and that the matter was tried before the Court. The Court failed to hear verbal testimony of any nature but merely rendered judgment on the certificates of the General Accounting Office after holding the matter under advisement for some time. As the trial court erroneously considered this as evidence of the amount due and owing, that evidence of course must be stricken but it would only be fair and equitable to permit the Court to consider other evidence, if the same is produced, as to the amount of damages sustained by the appellee.

These facts are absolutely certain, that a fire did occur and that property belonging to the United States was destroyed. The mere fact that proper evidence was not received as to the value of that merchandise destroyed would be a fair and just reason for sending the case back to the trial court for further consideration.

## II. The Propriety of Remanding This Case

The case of *United States v. Clark*, 96 U. S. 37, was a case in which the Supreme Court held there was no competent evidence before the Court of Claims as shown by their own finding of the contents or amount of the lost package. The Court of Claims' judgment was erroneous because it was based on inadmissible evidence. In that case the Supreme Court remanded the case to the Court of Claims directing that a new trial or rehearing be had and the question to be determined be limited to the contents of the lost package. That case is analogous and directly in point with the case at bar inasmuch as this Court has now held that the evidence received on behalf of the Government is incompetent. Also, in the case of *Norfolk Southern Railroad Company v. Ferebee*, 238 U. S. 269, the Supreme Court of the United States remanded the case for trial on the issue of damages alone, excluding the question of liability since there was no question of negligence or contributory negligence. Also, in the case of *Gasoline Products Company v. Champlin Refining Co.*, 283 U. S. 494 at page 500, the Court laid down the principle that a new trial on a single issue may not properly be resorted to unless it clearly appears that the issue to be retried is so distant and separable from the others that a trial of it alone may be had without injustice.

In that case the Court points out that the general rule is where the issues are separate and distinct and a retrial can be had of one of the issues independent of the others that a retrial can be had of the single issue. In employers liability cases oftentimes the question of negligence or contributory negligence is so interwoven that it is impossible to proceed without a completely new trial.

In the case at bar there are two independent, separate and distinct issues, the first of which has been determined in favor of the appellee. The second, being the amount of damages, could, in the interests of fairness and justice, be determined by the trial court with the trial court following the opinion of this court as to the weight and effect to be given to the General Accounting Office's memorandum under Sections 1732 and 1733 of Title 28. No hardship or prejudice could result to the appellant if the Government were able to meet this standard of proof because interest would not run on the judgment until the amount thereof would be ascertained or liquidated.

## CONCLUSION

It is respectfully urged that the opinion be amended to the effect that the case be remanded to the trial court for the ascertainment of the amount of damages.

Respectfully submitted,

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